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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1216

SID W. RICHARDSON FOUNDATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 23–38) is reported at 306 F. Supp. 755. The opinion of the court of appeals and its further opinion on rehearing (Pet. App. 39–50) are reported at 430 F. 2d 710.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1970, the day on which a second petition for rehearing was denied. The petition for a writ of certiorari was filed on January 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's claims to unlimited charitable deductions pursuant to Section 642(c) of the Internal Revenue Code were not properly before it and, in any event, were without merit.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 and the Treasury Regulations are set forth in the petition (pp. 3–5) and the Appendix thereto (pp. 51–53).

STATEMENT

Petitioner is the transferee of the assets of the Estate of Sid W. Richardson and, as such, is liable for the Estate's tax obligations. Richardson died on September 20, 1959, owning various interests in oil and ranching enterprises, including all of the outstanding stock in Richardson Oils, Inc. ("Oils"), a corporation taxable as a partnership pursuant to Subchapter S of the Internal Revenue Code.[1] At his death, all of his interests passed to his Estate. By his will, Richardson made a number of specific bequests and left the residue of his estate to petitioner, a qualifying tax-exempt foundation. The will directed that any income "re-

[1] A corporation electing to be taxed under Subchapter S (Sections 1371–1378 of the Code) pays no corporate income tax. Instead, each of its shareholders includes in his gross income for his taxable year both the distributions actually received from the corporation during the year and his share of the corporation's undistributed taxable income for the corporation's year that ends during his taxable year. See Section 1373.

ceived by or accrued" to the Estate during its administration was to be included in the residue. After satisfying the specific bequests out of corpus, the executors, on January 1, 1962, transferred the Estate's remaining assets to petitioner, subject to all of the Estate's unsatisfied obligations. (R. 155–158.)[1]

During the years in issue (the fiscal years ended September 30, 1960 and September 30, 1961), Oils continued its business operations and maintained its tax status as a Subchapter S corporation. It accordingly did not have to pay any corporate income taxes. Rather, the Estate, as Oils' sole shareholder, was required to include in its own gross income both the dividends received from Oils and Oils' remaining taxable income which was not distributed. This latter income, amounting to $492,016.18 for fiscal 1960, and $300,466.14 for fiscal 1961, was retained and used by the corporation and not made available to the Estate during the years in issue. (R. 161–162.)

On its income tax returns for these fiscal years, the Estate included Oils' undistributed taxable income in its gross income as required. It claimed deductions for this income under Section 642(c) of the Code, which provides that certain estates may deduct "any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid or permanently set aside for * * * charitable * * * purposes * * *." As a result of other claimed deductions, which offset the

[1] "R." references are to the record appendix in the court of appeals which we have filed with the Clerk of this Court.

Estate's other income in full, its returns for each of the years reflected no tax liability. (R. 161–162.)

Upon examination of the returns, the Commissioner disallowed the Estate's charitable deductions of the undistributed income of Oils. The basis for the disallowance was that this income, although includable in the Estate's gross income, remained under the dominion and control and subject to the use of Oils, and was neither paid nor owing to the Estate during the taxable years. It consequently did not meet the requirement of Section 642(c) that it be "paid or permanently set aside" for charity "during the taxable year."

Petitioner thereafter filed separate claims for refund for each of the fiscal years (R. 105, 116), in each instance asserting that the Estate was "entitled to an unlimited charitable deduction" under Section 642 (c), and incorporating by reference the protest it had previously filed with the Internal Revenue Service (Pet. App. 49–50). That protest stated the basis for petitioner's claims as follows (Pet. App. 48):

> So, in essence, the deficiencies in income tax proposed against the taxpayer in the examining officer's report are based upon what he determines to be the undistributed Subchapter S income of Richardson Oils, Inc. included in its tax returns for the respective periods. It appears that the correctness of this action is the *only* issue involved. [Emphasis added.]

In its briefs in the district court, petitioner pressed its claim relating to the treatment of the undistributed Subchapter S income for purposes of Section

642(e). It also repeatedly asserted that the Estate was entitled to an unlimited charitable deduction under that section. In this connection, it alluded to other unspecified income that might be deductible under Section 642(e) and thereby eliminate the tax deficiencies resulting from the Commissioner's disallowance of the deduction for Oils' undistributed taxable income. These broad statements, which were not related to any specific income, were obscured in the context of the Subchapter S issue, and the district court accordingly dealt only with that issue. It upheld the Commissioner's determination that the undistributed Subchapter S income was not, pursuant to the terms of the Richardson will, "paid or permanently set aside" for charity "during the taxable year" (Pet. App. 23–38). Petitioner did not seek rehearing of the district court's decision.

In its opening brief in the court of appeals, petitioner discussed only the Subchapter S question with particularity, although it again claimed that the Estate was entitled to an unlimited charitable deduction. Then, in its reply brief, it set forth in detail figures and computations purporting to show the Estate's entitlement to additional Section 642(c) deductions. At oral argument, the court directed the parties to file supplemental memoranda relating to the matters raised in petitioner's reply brief. Following receipt of these memoranda, the court put a number of written questions to the parties. They filed simultaneous answers, and petitioner subsequently filed a reply to the government's answers. The court of appeals then affirmed

the district court's decision as to the undistributed Subchapter S income (Pet. App. 39–50). It also held (Pet. App. 47–48) that petitioner's further claim had been improperly advanced, since it represented an entirely different ground for recovery than the ground specified in petitioner's claims for refund.

Petitioner filed a petition for rehearing, and supporting brief, and the court directed the government to file a response. The court then rejected the petition in a *per curiam* opinion, stating (Pet. App. 50):

> The entire record strongly indicates that the theory of the taxpayer's claim for refund was based upon its contention that the undistributed Subchapter S income of Richardson Oils was a part of the estate as distinguished from the corporate entity. Even if the claim for refund is construed as embracing other contentions, such contentions are rejected by the court. * * *

A second petition for rehearing was denied without comment, but only after the court considered an additional brief filed by petitioner and the government's response thereto.

ARGUMENT

The decision below is correct. There is no conflict or other basis for further review.

1. Petitioner complains at this juncture that the court below failed to give consideration to the arguments it advanced in support of its theory that it was entitled to an unlimited charitable deduction. But the court did consider the arguments raised in petitioner's reply brief and in its numerous post-argument submissions and rejected them, as evidenced by its *per curiam* opinion. Moreover, contrary to petitioner's

contention, the Fifth Circuit was not required to consider these arguments.

The filing of a timely claim for refund is a statutory prerequisite to a suit to recover taxes alleged to have been illegally collected. See Section 7422(a) of the Code; *United States* v. *Felt & Tarrant Co.*, 283 U.S. 269. The principal requirement of the statute is that the Commissioner be apprised by the timely filing of a claim of the precise basis on which the claim is predicated. *United States* v. *Pierotti*, 154 F. 2d 758 (C.A. 9). Under applicable Treasury Regulations (Sec. 301.6402-2(b)) broad and general language in a claim is not sufficient. Rather, it "must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." Having advanced one ground in a claim for refund, a taxpayer may not thereafter rely on a different ground in its subsequent suit for refund. *United States* v. *Garbutt Oil Co.*, 302 U.S. 528; *Alabama By-Products Corporation* v. *Patterson*, 258 F. 2d 892, 900 (C.A. 5).

That is what petitioner attempted to do. Its refund claims, when considered with the prior protest which it incorporated therein by reference, referred specifically only to the Commissioner's treatment of the undistributed Subchapter S income. The general claim that it was entitled to an unlimited charitable deduction did not emerge with any specificity until petitioner filed its reply brief in the court of appeals. Petitioner did not, as required by the regulations, "set forth in detail each ground upon which a credit or refund

is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof" with regard to what it now says (Pet. 13) is its "primary position."

Nor is there any basis in these circumstances for petitioner's assertion (Pet. 12–16, 19) that the government waived the defects in the refund claims by pleading and briefing the so-called unlimited charitable deduction issue. Prior to the filing of petitioner's reply brief in the court of appeals, the government did no more than deny, using the same general language used by petitioner, the Estate's entitlement to an unlimited charitable deduction. Petitioner recognized as much in that brief when it advised the court (p. 6) that there was no need for it to consider the question of the treatment of Oils' undistributed income, "which is the only one seriously dealt with in Appellee's brief * * *."

There is thus no conflict on the question of waiver between the decision below and this Court's holding in *Tucker* v. *Alexander*, 275 U.S. 228. As the Court explained in *United States* v. *Garbutt Oil Co.*, *supra* at p. 534, the *Tucker* case involved an express waiver by the government as to an issue not covered in a refund claim, but which was the only issue litigated in the trial court. There is likewise no conflict with the decision of any other appellate court. *Brown* v. *United States*, 427 F. 2d 57 (C.A. 9), and *Mennen Co.* v. *Kelly*, 137 F. 2d 866 (C.A. 3), both involved situations in which the issues not presented in the claims for refund had been initially injected into the cases by the government, rather than the taxpayers. The facts of this case are not comparable.

That the Fifth Circuit, like every other circuit, follows the rule of *Tucker* v. *Alexander*, *supra*, is shown by its opinion in *United States* v. *Smith*, 418 F. 2d 989, which was finally decided less than a year before its decision in this case. The court found on the facts there presented that the government had waived a defect in a refund claim. The instant case thus involves only the question whether, in the particular circumstances, a waiver had been established. That narrow issue does not warrant further review.

2. At all events, petitioner's additional claim is without merit. It rests on the proposition that although the Estate reported gross income for fiscal 1960 and 1961 of $2 million and $0.7 million, respectively, petitioner stipulated to gross income of $15 million and $17 million for these years (Pet. 16). As we understand these larger figures, they include the gross income of a variety of businesses in which the Estate had an interest, unreduced by the deductions actually allowed to those businesses. Thus, petitioner appears to be claiming a Section 642(e) deduction for expenses that have already been deducted under other provisions of the Code, a procedure which this Court has held to be impermissible. See *United States* v. *Benedict*, 338 U.S. 692.

If, on the other hand, the $15 million and $17 million figures represent income remaining after allowed business deductions, then petitioner's gross income as reported on its returns was understated by $13 million and $7.3 million, respectively. In this event, even as-

assuming that petitioner would be entitled to additional deductions of $12 million and $7.3 million,[1] this would do no more than offset the additional gross income that should have been included in its returns. Petitioner's tax liability would remain the same, since Olin's undistributed taxable income would still be includable in its gross income but would not be deductible.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[1] Such deductions would not be allowable if the additional gross income, like the undistributed Subchapter S income, was neither paid nor owing to petitioner during the taxable year. See *Freund's Estate* v. *Commissioner*, 302 F. 2d 30 (C.A. 2).